

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM SERGIO RODRIGUEZ,

Defendant and Appellant.

D069435

(Super. Ct. No. INF1200674)

APPEAL from a judgment of the Superior Court of Riverside County, Graham A. Cribbs, Judge. Affirmed in part, reversed in part with directions.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis, Eric A. Swenson Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted William Rodriguez of resisting an officer in the performance of his duties (Pen. Code,¹ § 69, count 1), criminal threats (§ 422, count 2), assault by means of force likely to produce great bodily injury upon a peace officer (§ 245, subd. (c), count 3), and harming a police dog (§ 600, subd. (a), count 4). The trial court found true that Rodriguez had one prior conviction for a serious felony under section 667, subdivision (a)(1); one prior strike conviction under section 667, subdivisions (d) and (e)(1), and section 1170.12, subdivisions (b) and (c)(1); and two prison prior convictions under section 667.5, subdivision (b). The court sentenced Rodriguez to an aggregate term of 15 years in prison; reduced and ordered payment of a probation revocation restitution fine previously imposed under section 1202.44 in an earlier case; and imposed a parole revocation restitution fine under section 1202.45.

On appeal, Rodriguez contends that the trial court erred by failing to instruct the jury on the lesser included offense of simple assault and on the requirement of unanimity. Rodriguez also asserts that the court's imposition of the restitution fine under section 1202.45 in the amount of \$10,000 was error. Rodriguez further contends that if this court determines that any of his claims were forfeited by trial counsel, he received ineffective assistance of counsel. Finally, Rodriguez asks this court to review the trial court's ruling on his motion to access personnel records of the police officer he assaulted.² We conclude that the trial court prejudicially erred when it failed to instruct on the lesser included offense of simple assault and further conclude that the court's imposition of a

¹ Subsequent statutory references are to the Penal Code.

² The Attorney General does not object to Rodriguez's request that we review the officer's file.

parole revocation restitution fine amounts to an unauthorized sentence. We reject Rodriguez's other contentions and, after conducting an independent in camera review of the officer's personnel records, affirm the trial court's denial of Rodriguez's motion to access the files.

FACTUAL AND PROCEDURAL BACKGROUND

In the early hours of the morning on March 13, 2012, Palm Springs Police Officer Luciano Colantuono was on patrol with his canine unit dog in a marked police car. At 1:42 a.m. Colantuono received notification from the police dispatcher that a white sport utility vehicle had been reported stolen near the area he was patrolling. As Colantuono drove through a residential neighborhood toward the location where the car was reported stolen, he spotted Rodriguez standing in a driveway next to a white truck. Colantuono passed Rodriguez and made a U-turn. After Colantuono turned his patrol car around, he turned on his car's spotlight and saw Rodriguez walking away in the four-lane street. Colantuono made another U-turn to follow Rodriguez. Colantuono briefly lost sight of Rodriguez after stopping his patrol car.

Colantuono turned toward his radio in the center of the car to call dispatch to inform them that he was going to attempt to make contact with Rodriguez. Before he could make the call, he saw Rodriguez standing next to his rolled-down window. When Colantuono turned to face Rodriguez, Rodriguez aggressively said "What the fuck?" Before Colantuono could react, Rodriguez punched Colantuono on the left side of his face. Colantuono described the blow as medium to hard, and said he was stunned by the punch and saw a flash of light.

After being struck by Rodriguez, Colantuono opened his car door and was able to get his leg part way outside the car. Rodriguez slammed the door on Colantuono's leg, preventing Colantuono from getting out of the car. When Colantuono sat up, Rodriguez yelled "I'm going to fucking kill you," and punched Colantuono in the face a second time. Colantuono said that the second blow was as strong as the first, that he thought Rodriguez was trying to knock him out, and that at that moment, he feared for his life. Colantuono testified "I was in fear, and I knew I needed to try to get out of [the] car as quickly as I possibly could or I was going to die inside my own police car."

As Colantuono moved toward the passenger seat to try to get out of the car, he kicked Rodriguez in the chest through the open driver's window. Rodriguez caught Colantuono's leg, but Colantuono quickly broke free and moved to the passenger seat. Colantuono was able to get out of the car through the passenger door. As Rodriguez advanced around the front of the patrol car toward him, Colantuono opened the back passenger-side door, letting his canine partner out of the car. Colantuono immediately gave the dog the "direct bite" command. The dog lunged toward Rodriguez, biting him on the left forearm. Colantuono then called for back-up, while the dog and Rodriguez moved to a grassy area nearby. Colantuono followed, intending to restrain and handcuff Rodriguez.

Rodriguez continued to fight, swinging at Colantuono with his right fist while the dog was still holding on to Rodriguez's left forearm. A missed swing at Colantuono caused Rodriguez to fall. Colantuono shouted at Rodriguez to stop resisting and struck Rodriguez twice in the ribs in an effort to subdue Rodriguez and control his hands. After

several seconds of continuing to resist, Rodriguez started to comply and asked Colantuono to get the dog to let go of his arm. Colantuono responded that he would release the dog once Rodriguez was in handcuffs. As Colantuono started to put handcuffs on Rodriguez, Rodriguez ripped his hand away and attempted to get the dog to release its grip by plugging the dog's snout with his hands and wrapping his legs around its neck.

As Colantuono struggled with Rodriguez, another officer arrived. The two officers were able to subdue Rodriguez and place handcuffs on him. Rodriguez and Colantuono were both taken to a nearby hospital. Colantuono had some swelling and redness on his face and soreness to his leg. An officer assigned to watch Rodriguez while he received medical attention testified that he overheard Rodriguez tell a doctor that he had slapped an officer in the face. During an interview with police shortly after he was released from the hospital, Rodriguez said that he did not remember the incident clearly. He admitted hitting Colantuono, but claimed that he had not hit Colantuono very hard. Rodriguez also conceded that he might have put his hands in the dog's nose, but said that he wrapped his legs around the dog only to show Colantuono how he could have gotten the dog to release his arm. Rodriguez told the interviewing officers that he was an addict and that he had bad experiences with law enforcement officers in the past.

DISCUSSION

Rodriguez asserts several claims of error. He contends that the trial court prejudicially erred by failing to instruct the jury on the requirement of unanimity and on the lesser included offense of simple assault. He also claims that the court erred in

imposing a parole revocation restitution fine and in denying his motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).³

I

Failure to Instruct on Unanimity and Simple Assault

Rodriguez asserts that the trial court erred in failing to instruct the jury on the lesser included offense of simple assault. Rodriguez also complains that this error was compounded by the court's failure to instruct on the issue of unanimity. He contends that the court's failure to give a unanimity instruction improperly allowed the jury to find him guilty if the jurors concluded that any one of three independently assaultive actions was likely to cause great bodily injury without requiring that the jurors agree on the particular act.

A

" '[A]ssertions of instructional error are reviewed de novo.' [Citation.]

Whether or not the trial court should have given a 'particular instruction in any particular case entails the resolution of a mixed question of law and fact,' which is 'predominantly legal.' [Citation.] As such, it should be examined without deference." (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.) In considering whether the trial court had a sua sponte duty to instruct the jury on a lesser included offense, we construe the

³ Rodriguez also asserts that if this court determines that any of these issues were waived by his counsel in the trial court, he was denied the effective assistance of counsel. Neither of the instructional error issues was waived, because the trial court has a sua sponte duty to instruct on both lesser included offenses and unanimity if the facts warrant the instructions. We also conclude that Rodriguez's counsel did not waive any claim as to the restitution fine imposed. Therefore, we do not reach Rodriguez's alternative assertion of ineffective assistance of counsel.

evidence in the light most favorable to Rodriguez. (*People v. Millbrook* (2014)

222 Cal.App.4th 1122, 1137.)

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998)

19 Cal.4th 108, 117.) A trial court has a " 'sua sponte duty to instruct on a lesser included offense . . . if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense.' " (*People v. Moya* (2009) 47 Cal.4th 537, 556.) However, " 'if there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions [on lesser included offenses] shall not be given.' " (*People v. Friend* (2009) 47 Cal.4th 1, 51-52.) In such a case, the jury is properly left with " 'an all-or-nothing choice' "—either the defendant committed the greater offense, or none at all. (*Id.* at p. 52.)

With respect to the issue of unanimity, "a jury verdict in a criminal case must be unanimous. [Citation.] Thus, [the California] Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed the *specific* offense he is charged with. [Citations.] Therefore, when the evidence suggests more than one discrete crime, either (1) the prosecution must elect among the crimes or (2) the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act. [Citations.] The unanimity instruction must be given

sua sponte, even in the absence of a defense request to give the instruction." (*People v. Hernandez, supra*, 217 Cal.App.4th at p. 569.)

There is no need for a unanimity instruction, however, "if the defendant offers the same defense or defenses to the various acts constituting the charged crime." (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) There is also no need for the instruction if the case falls within the so called "continuous-course-of-conduct exception." (*Ibid.*; *People v. Williams* (2013) 56 Cal.4th 630, 682.) This exception arises " ' "when the acts alleged are so closely connected as to form part of one transaction" ' " (*Williams*, at p. 682) or when there is " 'a continuous course of conduct of a series of acts over a period of time.' " (*Jennings*, at p. 679.) The course of conduct exception requires that " 'the defendant offer[] essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' " (*Williams*, at p. 682.)

"In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on *two discrete crimes* and not agree on any particular crime or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a *single discrete crime*. [Citation.] In the first situation, but not the second, it should give the unanimity instruction." (*People v. Hernandez, supra*, 217 Cal.App.4th at p. 570.)

B

We reject Rodriguez's assertion that a unanimity instruction was necessary here. In the presentation of his case, the prosecutor consistently asserted that all three assaultive acts were parts of a single assault. Further, Rodriguez's counsel offered the

same defense to all three assaultive acts, arguing that Rodriguez did not have the requisite intent to commit the offense and that the lack of severity of Colantuono's injuries showed that Rodriguez did not commit the assault with enough force to cause great bodily injury. Neither counsel suggested that the jury should view the acts (two punches and slamming the door on Colantuono's leg) independently, or that any of the acts were more or less likely to cause serious injury. Further, the acts were committed within a short period of time, and thus, were " ' "so closely related in time and place that the jurors reasonably [had to] either accept or reject the victim's testimony in toto." ' " (*People v. Lueth* (2012) 206 Cal.App.4th 189, 196; *People v. Jefferson* (1954) 123 Cal.App.2d 219, 219-220 [unanimity instruction not required where evidence showed defendant repeatedly attempted, over a period of 10 to 15 minutes, to stab police officers trying to subdue her].)

We do find error, however, in the trial court's failure to instruct on the lesser included offense of simple assault. The People concede, and we agree, that simple assault is a lesser included offense of assault by means of force likely to produce great bodily injury upon a peace officer (§ 245, subd. (c)). (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 747.) Section 240, simple assault, which Rodriguez contends the jury should have been instructed on, defines the crime as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." The elements of this provision are included in the elements of the offense charged here. (See *People v. Lopez* (1998) 19 Cal.4th 282, 288, ["if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former"].)

Thus, the question that we must address is whether a reasonable jury could have found that Rodriguez "committed only a simple assault and not an assault [by means of] force likely to produce great bodily injury." (*People v. McDaniel, supra*, at p. 748.)

"Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate. [Citations.] ' "The crime . . . , like other assaults, may be committed without infliction of any physical injury, and even though no blow is actually struck. [Citation.] The issue, therefore, is not whether serious injury was caused, but whether the force used was such as would be likely to cause it." ' [Citation.] The focus is on the force actually exerted by the defendant, not the amount of force that could have been used. [Citation.] The force likely to produce bodily injury can be found where the attack is made by use of hands or fists. [Citation.] Whether a fist used in striking a person would be likely to cause great bodily injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied." (*People v. McDaniel, supra*, 159 Cal.App.4th at pp. 748-749.) The force has to be "likely" to produce a great bodily injury and it is immaterial whether the victim in fact suffers any harm. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

If there is a question as to the character of the force actually used, the defendant is entitled to an instruction on the lesser included offense of simple assault and the court is required to give such instruction sua sponte. (*People v. Rupert* (1971) 20 Cal.App.3d 961, 968 (*Rupert*).) In this case, contrary to the People's assertion, although there was sufficient evidence to support the jury's verdict on the greater offense, there was also

substantial evidence before the jury from which it could have reasonably concluded that Rodriguez did not use force that was likely to produce great bodily injury.

Colantuono did not suffer serious injury from the punches or the door. This fact, alone, is not necessarily dispositive in determining whether there was a likelihood of great bodily injury. However, when this evidence is construed in Rodriguez's favor, as it must be, it supports the reasonable conclusion that Rodriguez's actions were not likely to produce serious injury. In addition, after his arrest Rodriguez admitted to police that he had hit Colantuono, but stated that the punches were "not hard" and were just "little jab[s]." Further, another officer overheard Rodriguez tell a doctor that he had "slapped" Colantuono.

Contrary to the People's assertion, Colantuono's testimony that the two punches that Rodriguez landed were "medium to hard," and that the first punch stunned him did not conclusively establish that the conduct was likely to produce great bodily injury. (See *Rupert, supra*, 20 Cal.App.3d at p. 968 [although evidence that defendant struck assault victim five times and knocked her to the floor could "support the jury's finding of assault by means of force likely to produce great bodily injury, the jury might also have reasonably concluded that no such force was used"].) While slamming the door on Colantuono's leg was arguably more likely than the two punches to produce great bodily injury, no such injury resulted; this act could also be reasonably construed to amount only to simple assault.

The People argue that even if the trial court erred by failing to instruct on simple assault, the error was harmless. We disagree. "A conviction of the charged offense may

be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (*Watson, supra*, 46 Cal.2d 818, 836)." (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) "In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Moye, supra*, 47 Cal.4th at p. 556.)

We conclude that it is reasonably probable that Rodriguez would have obtained a more favorable outcome if the jury had been instructed on the lesser offense of simple assault. Without the instructions, the jury faced an " 'unwarranted all-or-nothing choice' " of conviction or acquittal on facts showing that Rodriguez was guilty of some offense. (*People v. Hughes* (2002) 27 Cal.4th 287, 365.) The evidence concerning the amount of force that Rodriguez used could support a guilty verdict as to either offense. However, the evidence that Rodriguez used force likely to cause great bodily harm was not so strong, and the evidence that he did not use such force so weak, that it is not reasonably probable that the failure to instruct on simple assault had no effect on the outcome. The conviction under section 245, subdivision (c) is, therefore, reversed.

II

Restitution Fines

Rodriguez asserts that the sentencing court erred in imposing a parole revocation restitution fine of \$10,000 under section 1202.45 because the probation revocation restitution fine that the court imposed was only \$5,000.⁴ Rodriguez further asserts that the prosecutor's failure to object to the court's reduction of the probation revocation restitution fine from \$10,000 to \$5,000 forfeited any claim of error by the People with respect to that decision.

In response, the People argue that because the sentencing court failed to impose a restitution fine under section 1202.4, subdivision (b), the case must be remanded so the court can impose both that fine and (conceding that the \$10,000 parole revocation restitution fine was not proper) a parole revocation restitution fine in the same amount as the restitution fine. The People also assert that the court had no authority to reduce the previously imposed probation revocation restitution fine from \$10,000 to \$5,000, and that the prosecutor's failure to object did not result in a forfeiture because the reduction amounts to an unauthorized sentence. We conclude that the court pronounced an unauthorized sentence when it imposed the \$10,000 parole revocation restitution fine without imposing a restitution fine, and agree with Rodriguez that the prosecution forfeited any error with respect to (1) the court's failure to impose a restitution fine under section 1202.4, subdivision (b) and (2) the court's reduction of the probation revocation restitution fine.

⁴ As discussed below, we find error in the court's imposition of the parole revocation fine, but not the error posited by Rodriguez.

A

At sentencing, Rodriguez's counsel asked the court for clarification concerning the probation report's recommendation that the court lift the stay on the previously imposed probation revocation restitution fine of \$10,000 under section 1202.44. In response, the court stated that the fine "was imposed because of cases that [Rodriguez] was involved in prior in time. He obviously did not live up and successfully complete probation with regard to that. I will do this. I will reduce that to the sum of \$5,000 as opposed to the 10- that is being requested."

The abstract of judgment reflects the imposition of the \$5,000 probation revocation restitution fine and also a \$10,000 parole revocation restitution fine under section 1202.45. The judgment does not impose either a restitution fine or a victim restitution order under, respectively, section 1202.4, subdivisions (b) and (f). The probation report did not recommend restitution, as is required by section 1202.4, subdivision (b). The report did recommend victim restitution under section 1202.4, subdivision (f), but did not specify an amount, instead stating only that Rodriguez should "pay victim restitution in amount determined by Probation."

B

"Under subdivision (b) of Penal Code section 1202.4, a trial court must impose 'a separate and additional restitution fine' as part of the judgment of conviction entered against a criminal defendant, 'unless it finds compelling and extraordinary reasons for not

doing so, and states those reasons on the record.'^{5]} If the 'sentence includes a period of parole,' then the court *must* also impose a parole revocation fine 'in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.'^{6]} (§ 1202.45.) This second fine, however, is automatically suspended unless the court later revokes parole." (*People v. Smith* (2001) 24 Cal.4th 849, 851 (*Smith*), (footnotes omitted.)

Section 1202.44 provides that "[i]n every case in which a person is convicted of a crime and a conditional sentence or a sentence that includes a period of probation is imposed, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional probation revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.

This additional probation revocation restitution fine shall become effective upon the

⁵ Section 1202.4, subdivision (b), states: "(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, and not more than ten thousand dollars (\$10,000). If the person is convicted of a misdemeanor, the fine shall not be less than one hundred twenty dollars (\$120) starting on January 1, 2012, one hundred forty dollars (\$140) starting on January 1, 2013, and one hundred fifty dollars (\$150) starting on January 1, 2014, and not more than one thousand dollars (\$1,000). [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

⁶ Section 1202.45 states, in relevant part, "In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4."

revocation of probation or of a conditional sentence, and shall not be waived or reduced by the court, absent compelling and extraordinary reasons stated on record."

In *People v. Tillman* (2000) 22 Cal.4th 300 (*Tillman*) the California Supreme Court held that an appellate court may not correct the sentencing court's failure to impose a restitution fine and an associated parole revocation restitution fine where the People failed to object in the trial court. (*Tillman*, at p. 303.) The court concluded that the waiver doctrine applies when " 'the trial court[] fail[s] to properly make or articulate its discretionary sentencing choices' " and that the fine under section 1202.4, subdivision (b) is a discretionary sentencing choice because the statute permits the court to determine the amount or to waive the fine if its reasons for doing so are made clear on the record. (*Id.* at p. 302.) In so holding, the court "reasoned that waiver principles 'encourage development of the record and a proper exercise of discretion in the trial court,' as well as helping to 'discourage . . . invalid probation conditions and reduce the number of costly appeals brought on that basis.' " (*Id.* at pp. 302-303.)

However, when "the trial court imposes a restitution fine but omits or imposes an erroneous parole revocation fine" such an error "falls within the narrow class of sentencing errors exempt from the waiver rule." (*Smith, supra*, 24 Cal.4th at p. 851-853.) Unlike the discretionary restitution fine under section 1202.4, subdivision (b), "under section 1202.45, a trial court has *no* choice and *must* impose a parole revocation fine equal to the restitution fine whenever the 'sentence includes a period of parole.' Because the erroneous imposition of a parole revocation fine presents a pure question of law with

only *one* answer, any such error is obvious and correctable without reference to any factual issues in the record or remanding for further findings." (*Id.* at p. 853.)

The principles announced by the California Supreme Court in *Tillman* and *Smith* lead us to strike the parole revocation restitution fine as an unauthorized sentence, and to conclude that the People forfeited any objection to the sentencing court's failure to impose a restitution fine. Because the prosecutor did not object to the court's failure to impose the restitution fine, under the clear direction of *Tillman*, the issue is waived. (*Tillman*, *supra*, 22 Cal.4th at pp 302-303.) Further, section 1202.45 requires the fine imposed to be equal to the restitution fine imposed under section 1202.4, subdivision (b). (*Smith*, *supra*, 24 Cal.4th at p. 851) Because the court did not impose a restitution fine, the \$10,000 parole revocation fine constituted an unauthorized sentence, which this court may strike under *Smith*. (*Ibid.*)

The same principles support our conclusion that the People's failure to object to the trial court's reduction of the probation revocation restitution fine from \$10,000 to \$5,000 resulted in a forfeiture of the sentencing error that the Attorney General asserts in its brief (the court's failure to state its reasons for reducing the fine on the record). Although section 1202.44, like section 1202.45, instructs the court to impose a probation revocation restitution fine in the same amount as the restitution fine imposed under section 1202.4, subdivision (b), the provision also permits the court to waive or reduce the fine if it states on the record that there are "compelling and extraordinary reasons" for doing so. (§ 1202.44.) This same statutory language was the basis for the California Supreme Court's conclusion in *Tillman* that section 1202.4, subdivision (b) provided the

trial court with sentencing discretion and, thus, the failure to object results in a waiver of any claim of error. (*Tillman, supra*, 22 Cal.4th at pp. 302-303.) In this case, the trial court did not state any reason for the reduction, and its failure to do so was error. The record is clear, however, that the prosecution did not object to the reduction. Any challenge to the court's failure to state its reasons for its discretionary sentencing choice to reduce the fine, therefore, was forfeited.⁷ (*Ibid.*)

The Attorney General asserts that section 1202.46 provides a basis for this court to remand to the trial court to determine whether to impose a restitution fine and a parole revocation restitution fine in the same amount. We disagree. Section 1202.46 states: "when the economic losses of a *victim* cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined. Nothing in this section shall be construed as prohibiting a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine without a finding of compelling and extraordinary reasons pursuant to Section 1202.4." (§1202.46, italics added.) The statute, on its face, concerns circumstances under which the sentencing court may impose *victim* restitution,

⁷ The Attorney General cites *People v. Perez* (2011) 195 Cal.App.4th 801 (*Perez*) in support of its assertion that the court was not authorized to change the amount of the fine. Unlike this case, in *Perez* the trial court *increased* three probation revocation restitution fines imposed in three prior cases from \$200 to \$600. (*Id.* at p. 805.) The People properly conceded the increases in the fines were not authorized by section 1202.44. (*Ibid.*) The reduction of the fine at issue here, however, was authorized by the statute. (See section 1202.44 [the fine "shall not be waived or reduced by the court, absent compelling and extraordinary reasons stated on the record"].)

not the restitution fine required under section 1202.4, subdivision (b).⁸ (See *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1207 (*Turrin*) [the statute "must be read as a whole and in context, including provisions relating to the same subject matter"].)

The Attorney General cites *People v. Moreno* (2003) 108 Cal.App.4th 1 (*Moreno*), to support its argument that section 1202.46 statutorily overruled *Tillman*. As the Attorney General notes, however, *Moreno* involved post-conviction imposition of victim restitution by the trial court under subdivision (f) of section 1202.4, not the restitution fine under subsection (b) at issue here. In *Moreno*, the court rejected the defendant's argument that the People had waived their opportunity to request victim restitution by not doing so before the conviction was final, and held that the *trial court's* subsequent imposition of victim restitution after the conviction was final was specifically permitted by section 1202.46. (*Id.* at p.10.)

Unlike the restitution fine, the amount of victim restitution contemplated under section 1202.4, subdivision (f), may not be ascertainable at the time of sentencing. Section 1202.46 provides a mechanism for the trial court to retain jurisdiction to order victim restitution at a later time. (See *Turrin, supra*, 176 Cal.App.4th at p. 1208, fn. 3 [section "1202.46 provides that a court retains jurisdiction to impose or modify victim

⁸ Victim restitution is mandated by section 1202.4, subdivision (f), which states in relevant part, "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record." As stated, no victim restitution order was made in Rodriguez's case.

restitution," but "does not allow correction of a judgment for a restitution fine where its omission has been forfeited"]; *Moreno, supra*, 108 Cal.App.4th at p. 6 [trial court maintains jurisdiction under section 1202.46 to "modify the original sentence"]; Legis. Counsel's Dig., Sen. Bill No. 1126 (1999-2000 Reg. Sess.) [the bill "would require the court to retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined when the economic losses of a victim cannot be ascertained at the time of sentencing"].) Thus, we reject the Attorney General's assertion that section 1202.46 overruled *Tillman* or otherwise authorizes this court to remand to the trial court to impose a restitution fine under subdivision (b).⁹

To summarize, we conclude that the sentencing court erred by failing to impose a restitution fine under sections 1202.4, subdivision (b), and by failing to state its reasons for reducing the probation revocation restitution fine, but that the People forfeited their right to challenge these errors. Further, because no restitution fine was imposed, the imposition of the parole revocation fine under section 1202.45 amounts to an unauthorized sentence that must be stricken from the abstract of judgment.

IV

Pitchess Motion

Rodriguez requests that this court review the trial court's ruling on his *Pitchess* motion by independently reviewing the materials that the trial court examined in camera

⁹ The Attorney General also cites *People v. Zackery* (2007) 147 Cal.App.4th 380 in support of its assertion. That case does not address the issue presented here, but rather the constitutional question of whether the court can impose fines outside the presence of the defendant. (*Id.* at pp. 388-389.)

to determine whether the trial court abused its discretion in denying the motion. The People concede that we have the authority to do so. On our own motion, we augmented the record to include the materials that the trial court examined in camera. After independently reviewing them, we conclude that the trial court did not abuse its discretion in denying Rodriguez's *Pitchess* motion.

DISPOSITION

The conviction on count 3 under section 245, subdivision (c) is reversed and the case is remanded for possible retrial on that count. At any retrial, the trial court shall instruct the jury on the lesser included offense of simple assault. The trial court is directed to strike the \$10,000 parole revocation restitution fine, to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.